STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WENDELL KEVIN GILMER,

Defendant-Appellant.

UNPUBLISHED
January 24, 2006

No. 257268
Oakland Circuit Court
LC No. 2004-194793-FH

Before: Sawyer, P.J., and Wilder and H. Hood*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for first-degree retail fraud, MCL 750.356c. The trial court sentenced him to one to ten years' imprisonment. We affirm.

On September 18, 2003, Christopher Cockfield, a loss prevention officer at the Home Depot in Farmington Hills, observed defendant in the store. He watched defendant enter the tool corral, a horseshoe-shaped area with one entrance and exit, with an empty cart. Cockfield saw defendant take a $169 drill from the shelf and place it on the bottom rack of his cart. Defendant then walked around the tool corral before returning to the area where the drills were located. Defendant selected a second drill, identical to the first one, and placed it on the bottom of his cart. He then exited the tool corral. Cockfield testified that the store had cameras set up to videotape the tool corral. A video of the tool corral on September 18, 2003, was shown to the jury, and Cockfield identified defendant as the person depicted on the videotape selecting drills from a shelf.

After defendant left the tool corral, Cockfield saw him go immediately to the lawn and garden area without stopping at any cash register in the store. Cockfield watched defendant remove the drills from the cart and exit the store through the emergency doors. Cockfield followed him and saw him put the drills into a dark green Geo Metro and drive away. Cockfield reentered the store and consulted the "on-hand" report, which indicated that the store had five drills of the type taken by defendant. However, Cockfield only located three drills in the store.

After going to the police on an unrelated retail fraud matter, Cockfield mentioned the incident involving the dark green Geo Metro to Detective Bonnie Unruh. Cockfield identified defendant from a photographic lineup. Detective Unruh learned that the vehicle was registered

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

to defendant's brother. Defendant testified that, although he frequented the Home Depot store for his employment, he could not recall whether he was there on September 18, 2003. He denied stealing anything and claimed that, although he had been using his brother's car in 2003, he did not have possession of it on that date.

I

Defendant first argues that the destruction of potentially exculpatory videotape evidence denied him both a fair trial and the right to refute the prosecution's case. This Court reviews de novo issues concerning due process violations. *People v Izarraras-Placante*, 246 Mich App 490, 493; 633 NW2d 18 (2001).

Defendant's argument, that the destruction of potentially exculpatory evidence violated his due process rights, is without merit. "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988). See also *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992) ("[a]bsent the intentional suppression of evidence or a showing of bad faith, a loss of evidence that occurs before a defense request for its production does not require reversal"). "Defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith." *Id.*

When Cockfield met with Detective Unruh in October 2003, he provided her with a CD depicting several incidents of shoplifting from several different days at the Home Depot store. Cockfield testified that tapes from store cameras, other than the one focused on the tool corral, had existed for September 18, 2003, but they were no longer available. He admitted that he never looked at the other tapes to try to identify defendant, and he never reviewed those tapes in their entirety because none of the cameras were located in the areas where defendant immediately went after leaving the tool corral.

In this case, nothing in the record supports defendant's claim that potentially exculpatory evidence ever existed. The evidence was clear that there were no cameras at the entrances or exits of the store, no cameras in the main aisle, and no cameras in the areas where defendant immediately went after leaving the tool corral. Therefore, defendant has not even demonstrated that he was filmed on tape in another part of the store on September 18, 2003, much less that any store tape might have included potentially exculpatory evidence. Moreover, and more significantly, defendant has not demonstrated the existence of bad faith by the police or prosecutor in the destruction of the store tapes from that date. The evidence revealed that, on a three-month cycle, store films were recorded over by the cameras. The Home Depot was responsible for the loss of evidence. Even if Home Depot or Cockfield, a loss prevention officer, could be considered the "police" for purposes of the alleged due process violation, an issue we need not reach, defendant has not shown any bad faith in the failure to keep security films from other parts of the store. Defendant was not bound over to the circuit court for trial until February 27, 2004, at which point the store tapes from September 18, 2003, were already unavailable. They were not destroyed after discovery had started in this case. There was no due process violation. *Youngblood, supra* at 58; *Johnson, supra* at 365.

Defendant further contends that the trial court erred in refusing to provide a special adverse inference instruction regarding the videotape. We disagree. We also review de novo

claims of instructional error. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). A defendant is entitled to an adverse inference instruction upon a showing of bad faith. *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993). Defendant cannot demonstrate that he was entitled to the requested adverse inference instruction because he has not shown bad faith in the destruction of the videotapes. *Id.*

II

Defendant also argues that the prosecutor unfairly elicited MRE 404(b) evidence without proper notice. Defense counsel did not object to the challenged evidence and thus, the issue is unpreserved. We review unpreserved issues for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

During direct examination, the prosecutor questioned Detective Unruh about how the investigation of the September 18, 2003, crime began. The prosecutor asked Detective Unruh whether she and Cockfield discussed the case at hand when Cockfield was at the police station. Rather than responding with a "yes" or "no" answer, Detective Unruh stated, "[d]uring the conversation regarding the case, which he came in for, he sent, he mentioned, gave me information about that the guy in the Geo had hit the store again." The prosecutor immediately changed the subject and did not question Detective Unruh further about this response. During cross-examination, Detective Unruh repeated that Cockfield had said that the "guy in the green Geo Metro," "hit us again".

Defendant's argument that the prosecutor elicited improper MRE 404(b) evidence and did so without proper notice is without merit. MRE 404(b) provides that other acts evidence "is not admissible to prove the character of a person in order to show action in conformity therewith." The record does not support that the challenged evidence was solicited, introduced, admitted, or otherwise used by the prosecutor for an impermissible character purpose in order to obtain a conviction. Moreover, the prosecutor did not offer the evidence for a permissible purpose under MRE 404(b). Rather, he did not "offer" the evidence at all. The challenged testimony was offered on direct examination as part of a nonresponsive answer by the prosecution's witness. Under the circumstances, we conclude that the challenged testimony simply does not implicate MRE 404(b).

Even if we characterized the challenged testimony as implicating MRE 404(b), we cannot conclude that plain error, affecting defendant's substantial rights, occurred in this case. Defendant cannot demonstrate that Detective Unruh's statement affected the outcome of the proceedings. *Carines, supra.* The prosecutor did not argue the evidence for an improper character purpose. In fact, he did not use the testimony at all in his case or his summation. Moreover, at trial, defendant admitted that he had a prior conviction involving theft or dishonesty. He specifically explained that he believed he was being prosecuted for the crime at issue because of his previous conviction. Thus, there was properly admitted evidence before the jury that defendant had a prior conviction for theft. This, in turn, substantially minimized any prejudice that Detective Unruh's testimony may have had. More importantly, the evidence against defendant was overwhelming. Cockfield observed defendant from a distance and from close range. He positively identified defendant at a photographic lineup and at trial, and the videotape of the tool corral was shown to the jury. Further, Cockfield's identification of defendant was bolstered by his description of a vehicle matching the one that defendant

borrowed from his brother in 2003. Given the overwhelming evidence against defendant, we find no plain error requiring reversal. *Id.*

In reaching our conclusion, we note that any issue defendant may have with respect to the challenged testimony more properly lies in the context of a prosecutorial misconduct challenge and not a challenge under MRE 404(b). Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *Carines, supra* at 762-763; *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). No error requiring reversal will be found if the prejudicial effect of the prosecutor's improper conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

In general, nonresponsive testimony by a prosecution witness, including a police witness, does not justify relief for the defendant unless the prosecutor "knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony." *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Police officers, however, have a special duty to refrain from making prejudicial or irrelevant remarks during their testimony. *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983). Inadmissible evidence tying a defendant to other crimes is highly prejudicial whether elicited by defense counsel or the prosecutor. *Id.* at 416. In this case, there is no evidence that the prosecutor, by asking a "yes or no" question, knew that the challenged testimony would be given. There is also no evidence that the prosecutor conspired with the police witness to give the testimony. However, Detective Unruh's unsolicited testimony, given on both direct examination and cross-examination, was improper. It impermissibly signaled the jury to the possibility that defendant had robbed the store more than one time. Nevertheless, as previously discussed, defendant cannot demonstrate that Detective Unruh's testimony constituted plain error requiring reversal. Moreover, any reference to another "hit" on Home Depot could have been cured by a timely instruction, had one been requested. *Watson, supra* at 586. There was no plain error requiring reversal. *Carines, supra* at 762-763.

Affirmed.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Harold Hood